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JUN - 7 1993

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. 93-75
)	
TRINITY BROADCASTING OF FLORIDA, INC.)	File No. BRCT-911001LY
)	
For Renewal of License of)	
Station WHFT(TV) on Channel 45,)	
Miami, Florida)	
)	
and)	
)	
GLENDALE BROADCASTING COMPANY)	File No. BPCT-911227KE
)	
For a Construction Permit for a)	
New Commercial TV Station to)	
operate on Channel 45, Miami,)	
Florida)	
)	
To: Honorable Joseph Chachkin		
Administrative Law Judge		

OPPOSITION TO CONTINGENT MOTION TO ENLARGE ISSUES
AGAINST GLENDALE BROADCASTING COMPANY

GLENDALE BROADCASTING COMPANY

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Date: June 7, 1993

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. INTRODUCTION	1
II. THE FORT LAUDERDALE DECISION	3
III. ISSUES RE GLENDALE'S MIAMI SITE	8
IV. GLENDALE'S ORIGINAL FINANCIAL CERTIFICATION	9
V. THE ALLEGED REPORTING VIOLATIONS	11
A. Modification and Renewal Applications	12
B. Other LPTV Applications	14
C. The Miami Site	16
D. The Glendale Monroe Application	16
E. Conclusion	17
VI. RAYSTAY'S LPTV CONSTRUCTION PERMITS	18
A. The Initial Applications	19
B. The Extension Applications	23
VII. THE REHABILITATION SHOWING	26
VIII. GLENDALE'S INTENTION TO CONSTRUCT	27
IX. CONCLUSION	30

SUMMARY

TBF's motion to enlarge issues, which makes a host of misrepresentation accusations, must be denied in its entirety. TBF has utterly failed to show that George Gardner acted with an intent to deceive the Commission.

With respect to the prior adjudication of misconduct by Adwave Company, the Chief, Mass Media Bureau has determined that George Gardner currently has the qualifications needed to become a Commission licensee. That determination is binding upon the Presiding Judge in the absence of new facts, and TBF has not shown any new facts that would raise questions about Mr. Gardner's qualifications. MBLE comments that Gardner's

- iii -

modification or renewal applications noted by Trinity.
Glendale timely reported the cancellation of LPTV construction
permits held by Ravstav Company. The absolute most that TBF

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Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475 (1993). Now, TBF has filed a pleading littered with accusations of misrepresentation.

TBF's pleading is woefully deficient, however, because it fails to take into account what misrepresentation is. A false statement is not a misrepresentation unless it is made with an intent to deceive the Commission. Fox River Broadcasting Inc., 93 FCC 2d 127, 129, 53 RR 2d 44, 46 (1983). False statements submitted through carelessness, inadvertence, or gross negligence do not constitute misrepresentation. Pinelands, Inc., 7 FCC Rcd 6058, 6065, 71 RR 2d 175, 183 (1992).

TBF bears a high burden of justifying its requests for misrepresentation issues. In Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1099, 50 RR 2d 1251, 1258 (Rev. Bd. 1982), the Board warned:

Misrepresentation and lack of candor changes are very grave matters. They ought not be bandied about. They duty to come forward with a prima facie showing of deception is particularly strong

than Glendale, the pertinent issue is whether George Gardner - not anybody else connected with Raystay Company - acted with an intent to deceive the Commission. TBF has utterly failed to show such intent.

II. THE FORT LAUDERDALE DECISION

TBF first argues that qualifications issues must be specified against Glendale because of a prior Review Board decision disqualifying Adwave Company, an applicant in which George Gardner was the sole stockholder. RKO General, Inc., 4 FCC Rcd 4679, 66 RR 2d 1162 (Rev. Bd. 1989).¹ See TBF Motion, Pp. 4-14. TBF admits that the Commission held that the conduct in the Fort Lauderdale proceeding did not permanently disqualify Mr. Gardner from broadcast ownership. RKO General, Inc., 5 FCC Rcd 642, 67 RR 2d 508 (1990). Instead, the Commission held:

Accordingly, we will afford Gardner [and another individual] the opportunity to submit a showing of good character in connection with any application for a new station. If, in their showing, the applicants make an affirmative demonstration of rehabilitation and establish that they then possess good character, we would regard such a showing as favorably resolving our concerns about the alleged misconduct.

5 FCC Rcd at 644, 67 RR 2d at 511.

¹ Board Member Blumenthal strongly dissented from Adwave's disqualification. He found George Gardner to be "a thoroughly forthright man" and that his statements concerning his divestiture showed "an unselfconsciousness bespeaking a total lack of guile" and "anything but an intent to deceive..." 4 FCC Rcd at 4697, 66 RR 2d at 1183 (emphasis in original).

Such a showing was made in connection with LPTV applications filed by Raystay co., a corporation in which Mr. Gardner is the controlling stockholder. The Chief, Mass Media Bureau, reviewed Raystay's showing and concluded that Mr. Gardner possessed the requisite character qualifications to warrant grant of the applications. TBF Motion, Attachment 7. The Chief, Mass Media Bureau, did rule that Mr. Gardner would have to make similar showings in future broadcast applications.

When Glendale filed its Miami application on December 27, 1991, it fully disclosed the RKO decision and the requirement that a showing of good character be made. See TBF Motion, Attachment 8 (Exhibit 2 of the Glendale Miami application). Glendale further reaffirmed the affirmative showing of rehabilitation accepted by the Mass Media Bureau fewer than eighteen months previously and reported that it was unaware of any subsequent misconduct by Mr. Gardner. TBF Motion, Attachment 8, P. 3.



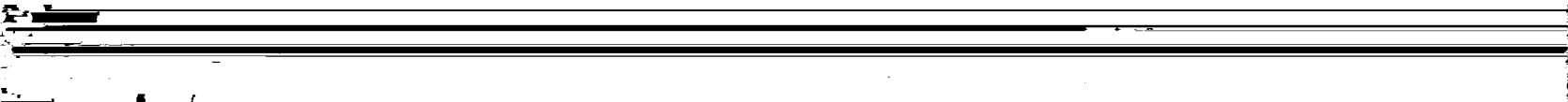



TBF requests two issues on this point. First, it seeks an issue to determine whether Glendale's showing "is of sufficient scope and currency" to meet the Commission's standards. The second requested issue is a general issue as to Glendale's qualifications in light of the RKO decision. Both requested issues must be denied because the Hearing

granting the LPTV applications filed by Raystay all bar addition of the requested issues.

When the Commission, or the staff acting pursuant to delegated authority, has thoroughly considered a matter, a Presiding Judge is bound by that analysis. Fort Collins Telecasters, 103 FCC 2d 978, 983-984, 60 RR 2d 1401, 1405-1406 (Rev. Bd. 1986), Frank H. Yemm, 39 RR 2d 1657, 1658-1659 (1977). In this case, the Chief, Mass Media Bureau fully considered the showing made by Mr. Gardner and found that the showing was sufficient to establish his qualifications as a Commission licensee. In the absence of new facts, the Presiding Judge would be required to reach the same conclusion because the staff's determination would be binding upon him.

TBF argues that in the Glendale Miami application, Mr. Gardner "provided no new information" and failed to make a proper showing. TBF Motion, P. 10. TBF is just plain wrong on this point. Glendale updated its prior showing by making current its representation that Mr. Gardner was unaware of any significant misconduct. Furthermore, TBF fails to cite any language in the Commission's order which supports its argument that Glendale was required to compile a completely new showing instead of updating the showing that had been previously provided. Most importantly, the same Commission that required Mr. Gardner to make an affirmative showing of good character had the showing before it and declined to request additional information. If a pre-designation review of an application

demonstrates that additional information is necessary, the hearing designation order will point out the deficiency and request that additional information. See, e.g., the hearing designation orders submitted as Attachment 1 to this opposition. Indeed, when the Commission imposed the affirmative showing of good character requirement, it explicitly stated that further inquiries would be made if deemed necessary RKO General, Inc. (WAXY-FM), supra, 5 FCC Rcd at 644, 67 RR 2d at 511-512. No such inquiries were made here. Under these circumstances, TBF's guess that the Commission totally failed to consider Mr. Gardner's showing (TFB Motion, P. 13) is baseless speculation which wholly fails to meet the standards imposed by Section 1.229(d) of the Commission's rules.



absence of new facts raising questions about Mr. Gardner's qualifications. the only result that could be reached is the

but held that the violation had no impact on Mr. Gardner's character qualifications. TBF Motion, Attachment 7, P. 2. Clearly, the trivial nitpicking that TBF engages in is woefully insufficient to raise questions about Mr. Gardner's character qualifications.

III. ISSUES RE GLENDALE'S MIAMI SITE

TBF seeks site availability and a related misrepresentation/lack of candor issue based upon its allegations that the TAK Broadcasting site specified by Glendale is not available to Glendale. Specifically, TBF argues that (1) Glendale failed to timely accept TAK's offer to make the site available (TBF Motion, Pp. 14-17), and (2) that the lease between TAK and TBF precludes TAK from providing Glendale access to the site for two years after TBF loses its license (TBF Motion, Pp. 17-21).

Glendale has fully demonstrated in its "Opposition to Motion to Dismiss Application of Glendale Broadcasting Company" being filed simultaneously with this pleading that the TAK Broadcasting site has always been available to it. Specifically, Glendale demonstrates in that pleading that (1) Glendale accepted the TAK Broadcasting offer in a timely fashion, (2) TBF failed to rebut TAK's stated position that the TAK-TBF lease would be terminated if TBF loses its license, (3) TBF's attempt to use the lease to insulate itself from competition is wholly improper, and (4) even if TBF's interpretation of the lease is correct, the TAK site is

legally available to Glendale. Instead of repeating its showing, Glendale will refer the Presiding Judge to and incorporate by reference the showing and arguments made in the opposition to TBF's motion to dismiss.

Since the TAK site has always been available to Glendale, it follows that there was no misrepresentation or lack of candor in Glendale's site certification. Even if there was a question as to the site's availability, however, that question would not justify the addition of a misrepresentation/lack of candor issue. TBF has utterly failed to provide any evidence of an intent to deceive the Commission, which is an essential element of misrepresentation or lack of candor. Fox River Broadcasting, Inc., supra. Glendale had a site availability letter, which was signed and returned to TAK's representative. Mr. Gardner had no reason to believe that the site might be unavailable until TBF filed its motion. Declaration of George F. Gardner (Attachment 2 to this opposition), P. 1. Under these circumstances, TBF's request for site availability and misrepresentation/lack of candor issues must be denied as specious.

IV. GLENDALE'S ORIGINAL FINANCIAL CERTIFICATION

At the time Glendale filed its original application for Miami, it was relying upon funds from Mr. Gardner as well as a lease letter from The Firestone Company, an equipment leasing company. See TBF Motion, Attachment 13. On March 26, 1992, Glendale amended its application as of right to

substitute a bank letter from Northern Trust Bank of Florida for Mr. Gardner's personal funds. See Attachment 3 to this opposition. TBF does not seek a financial qualifications issue against Glendale, nor does it challenge the Northern Trust Bank letter. It only seeks an issue to determine whether Glendale's original financial certification was false. TBF Motion, Pp. 21-24. This request must be denied as totally baseless.

"[D]isqualification under a false certification issue is not warranted unless the applicant intended to deceive the Commission when it certified that it was financially qualified." Georgia Public Telecommunications Commission, 7 FCC Rcd 2942, 2948, 70 RR 2d 1308, 1315 (Rev. Bd. 1992), affirmed 7 FCC Rcd 7996, 7998 (1992). In a letter which was submitted with Glendale's application, Mr. Gardner readily disclosed that while he did not have net liquid assets to meet his commitment, he had more than sufficient assets which could be readily liquidated to meet his commitment. Glendale Application, Exhibit 4, P. 1 (TBF Motion, Attachment 13).

TBF does not even challenge Mr. Gardner's statement that he had sufficient assets to meet his commitment. Instead, its "showing" of intent to deceive consists of sheer speculation that Mr. Gardner did not meet an alleged requirement to appraise assets. TBF Motion, Pp. 22-23. It has not supported its assertions in a competent fashion. Since TBF has failed to make a prima facie case that Glendale was not financially

qualified, Glendale is under no obligation to document its financial plan. Priscilla L. Schwier, 4 FCC Rcd 2659, 2660, 66 RR 2d 727, 729 (1989). Even if TBF had managed to show that Glendale's certification was technically deficient, such a deficiency would fail to demonstrate the intent to deceive which must be shown to justify a false certification issue. In any event, Mr. Gardner affirms that the statement in his letter was correct. See Attachment 2. Accordingly, TBF's request for a false financial certification issue must be summarily denied.²

V. THE ALLEGED REPORTING VIOLATIONS

TBF next alleges a host of reporting violations by Glendale. TBF Motion, Pp. 25-32. Most of the alleged violations do not exist - they relate to matters which Glendale was not required to report. Indeed, TBF's arguments are sheer hypocrisy because it has declined to report the filing of the types of applications that it is berating Glendale for not filing. See the public notices submitted as Attachment 4 to this opposition. In any event, all of the events in question relate to stations or applications that were referenced in Glendale's application or that TBF had specific notice of. In David Ortiz Radio Corp. v. FCC, 941

² Weyburn Broadcasting Limited Partnership v. FCC, 984 F. 2d 1220, 1231 (D.C. Cir. 1993) (TBF Motion, P. 23) bears absolutely no relationship to this case. Weyburn involved a financial qualifications issue, not a false financial certification issue. Moreover, an applicant's reliance on non-liquid assets was not at issue in Weyburn.

F.2d 1253, 1259, 69 RR 2d 1011, 1015 (D.C. Cir. 1991), the Court of Appeals noted:

A §1.65 violation is disqualifying only if evidence indicates that the applicant intended to conceal the information from the Commission, or if the reporting violations are so numerous and serious as to indicate irresponsibility. See Valley Broadcasting Co., 4 FCC Rcd 2611, 2618 (Rev. Bd. 1989).

TBF has wholly failed to make a prima facie case that a qualifications issue is warranted under that standard.

A. Modification and Renewal Applications

Most of the reporting violations alleged by TBF relate to modification or renewal applications filed by Raystay Company with respect to low-power television construction permits or a license held by Raystay. TBF Motion, Pp. 25-28. Simply put, Glendale had no obligation to amend its Miami application to report any of these applications.

TBF's argument is based upon a distorted reading of Question 7(a) of Section II of the application form. That question, in its entirety, asks:

Does the applicant, any party to the application, or any non-party equity owner in the applicant have, or have they had, any interest in: a broadcast station, or pending broadcast station application before the Commission?

In response to that question, Glendale reported the existence of the one LPTV license and the five LPTV construction permits held by Raystay. See TBF Motion, Attachment 8 (Exhibit 2 of the Glendale application). TBF interprets the phrase "pending

broadcast station application" to include not only applications separate and apart from an existing station (e.g., an application for a new broadcast station), but every single application relating to a broadcast station already reported in which a principal has or had³ an interest. Thus, under TBF's interpretation of the question, if a principal had a minority interest in a station twenty years ago, and that station had filed an application to modify a construction permit or to measure power directly, the applicant would have an obligation to report not only the interest in the station but every routine application relating to that station. Such a requirement would be ridiculously burdensome.

TBF's interpretation is absurd. Not surprisingly, TBF's argument is not supported by any rule of case law. The purpose of the question is to force an applicant to fully divulge its diversification posture and to ensure compliance with the multiple ownership rules. With that purpose in mind, the only logical interpretation of the question is that it only requires reporting of broadcast station interests (licenses and construction permits), and pending broadcast station applications for new stations, but not including applications such as routine extension or renewal applications that would have no impact upon the applicant's qualifications.

³ The question makes no distinction between past and present interests.

Under that standard, Glendale had no obligation to report the modification or renewal applications.

If TBF is arguing that modification and renewal applications relating to existing stations are matters that must be reported pursuant to Section 1.65 of the Commission's rules, it has committed far more violations of Section 1.65 than it accuses Glendale of. Attachment 4 to this opposition consists of public notices listing a countless number of renewal or modification applications filed by Trinity Broadcasting Network or National Minority TV, Inc. TBF has never amended its renewal application to report any of these applications. Under these circumstances, its argument is sheer hypocrisy.

B. Other LPTV Applications

TBF seeks the specification of a reporting issue because of the recent cancellation of four LPTV construction permits held by Raystay. TBF Motion, Pp. 28-30. In its integration and diversification statement (Attachment 5 to this opposition), Glendale timely reported on May 3, 1993 that those permits were cancelled by the Commission on April 8, 1993.⁴ In Pinelands, Inc., supra, 7 FCC Rcd at 6064 n.25, 71 RR 2d at 182 n.25, the Commission summarily rejected an argument that a Section 1.65 violation occurred because

⁴ The reference to W56CJ, Red Lion, PA, should be a reference to W23AW, Lancaster, PA. That error was made by counsel in preparing the integration and diversification statement.

information was reported other than by a formal amendment containing the information. The Commission wrote:

Pinelands's identification of, and reference to, the June 12 amendment on file satisfied the fundamental purpose of Section 1.65, to keep the Commission, the public and concerned parties informed of changed circumstances.

Similarly, Glendale's timely statement in its integration and diversification statement served the same purpose, and TBF's argument is pure sophistry.⁵

TBF also challenges Glendale's failure to report the grant of an LPTV assignment application whose filing Glendale timely reported in an amendment filed on February 13, 1992. A copy of that amendment, which is submitted as Attachment 7 to this opposition, demonstrates that Glendale made a timely divestiture commitment for LPTV station W23AY. Glendale thus implicitly represented that the assignment would be carried out. If the assignment proposed in that application had not been carried out, Glendale would have had an obligation to report that fact. When Raystay acted in a manner consistent with the amendment, the obligation to further report anything

- 16 -

intention or motive to hide the disposition of the assignment application. The disposition of W23AY could readily be ascertained from the Commission's records. No issue is

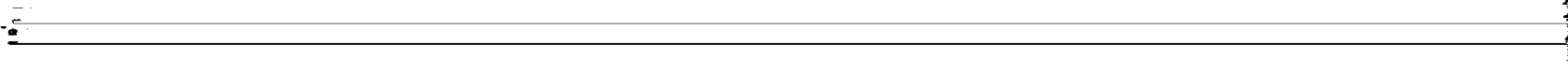







nor can this isolated violation form any basis for specifying a basic qualifications issue. In order to ensure that Glendale's application is absolutely complete, Glendale will shortly amend its Miami application to report the filing of the Monroe application (as well as the grant and consummation of the W23AY assignment application).

E. Conclusion

Glendale has fully and timely disclosed all information in this proceeding that could have an impact on its application. Most of TBF's allegations of reporting violations are absolutely baseless. The absolute most that TBF has shown is one (or arguably two) isolated and inadvertent Section 1.65 violations. TBF's request for a Section 1.65 issue is thus woefully deficient. See H & H Broadcasting Co., 43 FCC 2d 245, 28 RR 2d 817 (Rev. Bd. 1973) (three violations of Section 1.65 do not form a basis for adding a Section 1.65 issue).

Even if every application TBF notes was required to have been reported, however, a Section 1.65 issue would not be warranted. In Radio Station WABZ, Inc., 90 FCC 2d 818, 824-827, 51 RR 2d 1507, 1512-1515 (1982), the Commission refused to disqualify an applicant who had repeatedly violated Section 1.65 of the Commission's rules because there was no evidence of an intent to deceive the Commission. Specifically, the Commission found that any violations could not be found disqualifying because the applicant had voluntarily disclosed

the information that was not reported or the information was available elsewhere in the Commission's files. Similarly, the Review Board noted in Shawn Phalen, 7 FCC Rcd 623, 626, 70 RR 2d 855, 860 (Rev. Bd. 1992) "that when the acquisition of a broadcast interest is reported to (and on public file with) the Commission, it is difficult to infer an intent to deceive". Here, Glendale timely reported the LPTV license and all of the LPTV construction permits held by Raystay, so TBF had specific notice that it should check the Commission's



assurance that those sites would be available. Second, TBF argues that certain statements made in applications to extend those construction permits were misrepresentations. Again, TBF has wholly failed to show the existence of a false statement made with an intent to deceive the Commission. Its arguments are nothing more than another baseless attempt to attack Glendale's character qualifications.

A. The Initial Applications

Two points must be kept in mind in evaluating TBF's argument that Raystay misrepresented that it had reasonable assurance of the Lancaster and Lebanon sites. First, as TBF implicitly admits, the question is not whether those sites were actually available to Raystay. TBF Motion, P. 36. The question is whether there was knowledge that the sites were unavailable so that a misrepresentation occurred.

Second, TBF ignores the fact that the original LPTV applications were signed not by George Gardner but by David A. Gardner, who, at that time, was a Vice President of Raystay. TBF Motion, Attachment 15. David Gardner is not a principal, director, or officer of Glendale. Assuming arguendo that David Gardner made a misrepresentation, such action would have no impact on Glendale's qualifications. TBF has offered no evidence that George Gardner was involved in any misrepresentation that was made in the original applications, so its argument is per se defective.

In any event, no misrepresentations were made in the original LPTV applications because Raystay did obtain reasonable assurance of site availability for both sites. Raystay hired Gregory B. Daly of TelSA, Inc. (who also acquired Glendale's Miami site) to obtain sites for the Lancaster and Lebanon LPTV applications. See the Declaration of Gregory B. Daly submitted as Attachment 8 to this application. Mr. Daly first drove to Lancaster on February 14, 1989 to find a site. After searching, he found the grounds of the Ready Mixed Concrete Company and talked with Edward Rick, III. Mr. Daly explained to Mr. Rick that a client was interested in locating a LPTV facility on top of the existing structure. He specifically explained that the use of the site would be for a LPTV station and that the

facility would have to comply with ANSI RF radiation guidelines. When Mr. March did bring up the size of the structure, Mr. Daly explained that a precise drawing was unavailable but that it would be available before a lease was entered into. Attachment 8, P. 3. Notwithstanding Mr. March's questions, he then signed a letter of intent granting reasonable assurance of site availability. See Attachment 8. As contemplated by the site assurance letter, Raystay's Lebanon applications proposed the building of a "pedestal" with the antennas on top of the pedestal. TBF Motion, Attachment 15, Figure 3 (Lebanon applications).

In National Innovative Programming Network, Inc. of the East Coast, 2 FCC Rcd 5641, 5643, 63 RR 2d 1534, 1539 (1987), the Commission recited its reasonable assurance standard for site availability:

We have long held that a broadcast applicant need not have a binding agreement or absolute assurance of a proposed site. What an applicant must show ...is that it has obtained reasonable assurance that its proposed site is available, with some indication of the property owner's favorable disposition toward making an arrangement with the applicant, beyond simply a mere possibility... This reasonable assurance may be acquired by informal telephone contacts by counsel for the applicant, and rent and other details may be negotiated at a yet undetermined future date.

The letters signed by Mr. Rick and Mr. March fully complied with the reasonable assurance standard. Both letters provided their willingness and ability "toward making an arrangement